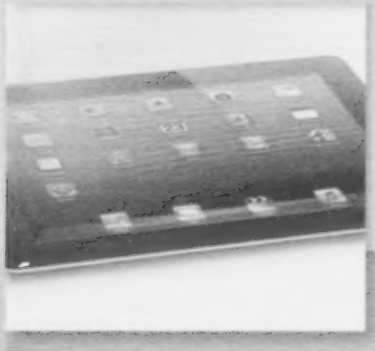

ANNUAL REPORT
2015-16

Copyright Board of Canada

Copyright Board of Canada

CANADA

Commission du droit d'auteur du Canada

August 31, 2016

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development Canada
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the twenty-eighth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2016.

Yours sincerely,

Claude Majeau

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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BOARD MEMBERS AND STAFF

AS OF MARCH 31, 2016

Chairman:	The Honourable Robert A. Blair
Vice-Chairman and Chief Executive Officer:	Claude Majeau
Member:	J. Nelson Landry
Secretary General:	Gilles McDougall
Senior Legal Counsel:	Sylvain Audet
Legal Counsel:	Valérie Demers Jean-Arpad Français Marko Zatowkaniuk
Director, Analysis and Research:	Dr. Raphael Solomon
Economic Analyst:	Dr. Rashid Nikzad
Senior Clerk:	Nadia Campanella
Assistant Clerks:	Maryse Choquette Pingyin Roch Levac
Registry Officers:	Sid Bateman Tina Lusignan
Manager, Corporate Services:	Nancy Laframboise
Financial and Administrative Assistant:	Jo-Anne Boucher
Technical Support Officer:	Michel Gauthier
Administrative Assistant:	Hibak Muse

Copyright Board of Canada

CHAIRMAN'S MESSAGE

I am pleased to present the 2015-16 Annual Report of the Copyright Board of Canada, the first since my appointment as Chairman. The Report documents the Board's activities during the year in carrying out its mandate as an economic regulator charged with setting royalties that are fair and equitable to both rights owners and users of copyright-protected works.

In my short time as Chairman, I have been struck by the demanding nature and complexity of the economic and legal issues underlying this work and by the skill and dedication brought to it by the Board's professional and support staff, by my Board colleagues, and by counsel involved in the Board's deliberations.

The Board performs its role as a quasi-judicial administrative tribunal in a public policy context that is governed by the legislative and jurisprudential framework in which it operates and increasingly shaped by fast-paced innovations in digital and Internet technology. In addition, it is required to consider more than just the interests of the parties in the proceedings before it. As the Vice-Chairman recently explained to the House of Commons Standing Committee on Industry, Science and Technology:

> "[the Board's] mandate and responsibilities involve more than simply resolving a dispute between the individual parties before it; [they] involve public policy considerations and the weighing of a large number of conflicting and overlapping factors that affect the industry and the public interest as a whole. This has implications for our processes and procedures, and the resources needed to fulfil our mandate [...]"

As this and previous Reports illustrate, the Board's role, along with the implications for its processes and procedures, have evolved considerably over time. Ongoing amendments to the *Copyright Act* have continuously added to the legal and policy issues the Board must address and take into consideration in setting royalties and tariffs. In addition, decisions of the Federal Court of Appeal and the Supreme Court of Canada have had, and will continue to have a significant bearing on the Board's mandated activities. All the major principles of copyright law articulated by the Supreme Court and several of the new provisions resulting from the reform of the *Act* in 2012 are addressed by the Board during the course of its various deliberations. For practical purposes, the Board acts in many respects as a tribunal of first instance for copyright-related matters in the areas covered by its mandate. In short, the Board plays a central and important role in determining copyright issues touching its assigned duties.

The activities outlined in this Report reflect this underlying context. I highlight the following.

The Board held two hearings in 2015-16. The first dealt with the retransmission of distant television signals, an evolving area that the Board has not been required to address in a public hearing since 1991 and one in which the Board and the participating stakeholders have had to grapple with the potential effect of changing technology and viewer preferences. The second hearing dealt with the reproduction of literary works by post-secondary educational institutions, also an evolving area affected by recent legislative amendments and judicial pronouncements bearing on the issue of fair dealing in the educational sector.

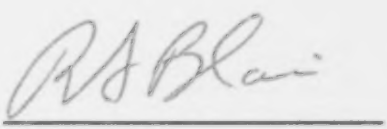
In addition, the Board issued two major decisions. Both dealt with the reproduction of literary works in the repertoire of Access Copyright – the first, with the reproduction of those works by Provincial and Territorial Governments (the public sector); and the second, with the reproduction of those works by Elementary and Secondary Educational Institutions (the educational sector, again). Both cases required the Board to set new royalties in the context of the developing area of the law respecting fair dealing.

The Board also issued six licences pursuant to the provisions of the *Copyright Act*, which permit the use of published works when copyright owners cannot be located. As well, Board staff assisted a number of individuals and organizations requesting a licence to locate the copyright owner thereby facilitating the use of published works.

The Board endeavours to render decisions in a timely manner but, as noted, must do so in a setting characterized by the increasing volume and complexity of the issues coming before it – from both an economic and legal perspective. In 2014 the Board established a Working Committee on the Operations, Procedures and Processes of the Copyright Board, comprised of experienced lawyers who practice before the Board. That process is continuing and the Board is aware of other studies being conducted as well. I am confident that the outcome of these reviews will lead to some streamlining of the Board's processes, but they will not diminish the Board's expanding workload. On these as well as other issues, the Board is looking forward to working in close collaboration with Innovation, Science and Economic Development Canada and other government officials to enhance the effective fulfillment of its mandate.

In concluding, I must pay tribute to the contributions made by the Board's professional and support staff to the effectiveness of the Board's operations. Without their accomplished and knowledgeable assistance the Board would not have been able to carry out its responsibilities over the past year in the reasonably timely fashion that it did. As my predecessor, the Honourable William J. Vancise, acknowledged in his final Report, "the Board is fortunate to have such qualified and dedicated employees who truly bring meaning to the concept of public service. Their expertise and work ethic make the work of the Board possible."

I am particularly happy to join the Copyright Board at a time where it is facing so many exciting challenges and opportunities, and to bring my own experience to contribute to the important work and decisions of the Board.



The Honourable Robert A. Blair

MANDATE OF THE BOARD

The Copyright Board of Canada (the "Board") was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licences when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the "*Act*") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions, and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The responsibilities of the Board under the *Act* are to:

- certify tariffs for
  - the public performance or the communication to the public by telecommunication of musical works and sound recordings;
  - the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act*, such as the reproduction of musical works, of sound recordings, of performances and of literary works; and,
  - the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes;
- set levies for the private copying of recorded musical works;
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions;
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located;
- examine agreements made between a collective society and a user which have been filed with the Board by either party, where the Commissioner of Competition considers that the agreement is contrary to the public interest;
- receive such agreements with collective societies that are filed with it by any party to those agreements within 15 days of their conclusion;
- determine the compensation to be paid by a copyright owner to a person to stop her from performing formerly unprotected acts in countries that later join the *Berne Convention*, the *Universal Convention* or the *Agreement establishing the World Trade Organization*; and,
- conduct such studies with respect to the exercise of its powers as requested by the Minister of Industry.

OPERATING ENVIRONMENT

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to create the Copyright Appeal Board.

On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (*An Act to amend* the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings ("the neighbouring rights"), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings ("the home-taping regime") and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes ("the educational rights").

The *Copyright Modernization Act* (Bill C-11) received Royal Assent on June 29, 2012, and many of its provisions came into force on November 7, 2012. Though this legislation does not change the mandate of the Board or the way it operates, it provides for new rights and exceptions that will affect the Board's work.

The coming into force of new distribution and making available rights for authors, performers and makers of sound recordings, and the addition of education, parody and satire as allowable fair dealing purposes may affect existing and future tariffs or licences. New or modified exceptions dealing with non-commercial user-generated content, reproductions for private purposes, program copying for the purpose of time-shifting, backup copies, ephemeral copies by broadcasting undertakings and certain activities of educational institutions, among others, may affect some uses that are or may be subject to a Board tariff.

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearing has been held to date for a request to use a work whose owner cannot be located. Information is obtained either in writing or through telephone calls.

The examination process is always the same. Tariffs come into effect on January 1. On or before the preceding March 31, the collective society must file a statement of proposed royalties which the Board then publishes in the *Canada Gazette*. Users (or, in the case of private copying, any interested person) or their representatives may object to the statement within 60 days. The collective society and the objectors present oral and written arguments. After deliberation the Board certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons for its decision.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the specific circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at any time. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariffs; the practicality of the administration to avoid tariff structures that make it difficult to administer the tariff in a given market; the search for non-discriminatory practices; the relative use of protected works; the taking into account of the Canadian environment; the stability in the setting of tariffs that minimizes disruption to users; as well as the comparisons with "proxy" markets and comparisons with similar prices in foreign markets.

Working Committee on the Operations, Procedures and Processes of the Copyright Board

The need to re-examine the Board's procedures has been discussed for some time. The June, 2014 report of the Standing Committee of the House of Commons on Canadian Heritage entitled *Review of the Canadian Music Industry* documents a wide consensus in two respects. First, the Board provides a valuable service to both rights holders and copyright users by ensuring payment for protected uses and by providing marketplace certainty. Second, it takes too long to render decisions, largely because of a lack of resources. The Standing Committee recommended dealing with delays ahead of the five-year review of the *Copyright Act* due in 2017. The Government preferred to leave the matter with the Board for the time being, adding that the five-year review would be "an opportune moment to consider important copyright issues, such as the broader framework in which the Copyright Board operates."

On November 26, 2012, the Board had established a committee of seasoned practitioners representing copyright users and owners to look into its operations, procedures and processes. The terms of reference, finalized in June, 2013, are as wide as they are clear: to conduct a thorough review of the Board's processes in general and of the Directive on Procedure in particular; without limitation, to review the various steps of proceedings before the Board so that they can be made more efficient; and to suggest tools to improve access to decisions and help focus applications based on earlier rulings in similar matters. These terms go beyond examining specific questions about the hearing procedure itself, within the Board's existing framework.

To start with, the Committee identified three areas which it found amenable to significant improvements within a fairly short time frame: the identification and disclosure of issues to be addressed during a tariff proceeding, interrogatories, and the confidential treatment of information. In December 2014, the committee finalized a discussion paper dealing with the first two sets of issues. The paper was emailed to known stakeholders and posted on the Board's web site in February 2015. Comments were received in March and responses in April.

With respect to the identification and disclosure of issues to be addressed during a tariff proceeding, the committee recommended that the Board and its stakeholders develop and progressively implement new ways of notifying users about proposed tariffs. Electronic notice should be favoured over paper notification.

The most efficient form of communication for each user type in each situation should be used. Trusted third parties should be identified through whom more loosely organized user groups could be notified of proposed tariffs. The Board should use its power to cause notices to be distributed only if experience proves that this is the only means through which adequate publicity can be compelled: cooperation should be favoured over compulsion.

The committee also recommended that parties inform each other of their position in the matter long before statements of cases are filed. A collective should provide, with the proposed tariff, on a without prejudice basis, information about the content of a tariff of first impression and about the nature, purpose and ambit of any proposed material change to an existing tariff. Objectors, having received this information, would be asked to explain early on why they object to the proposed tariff.

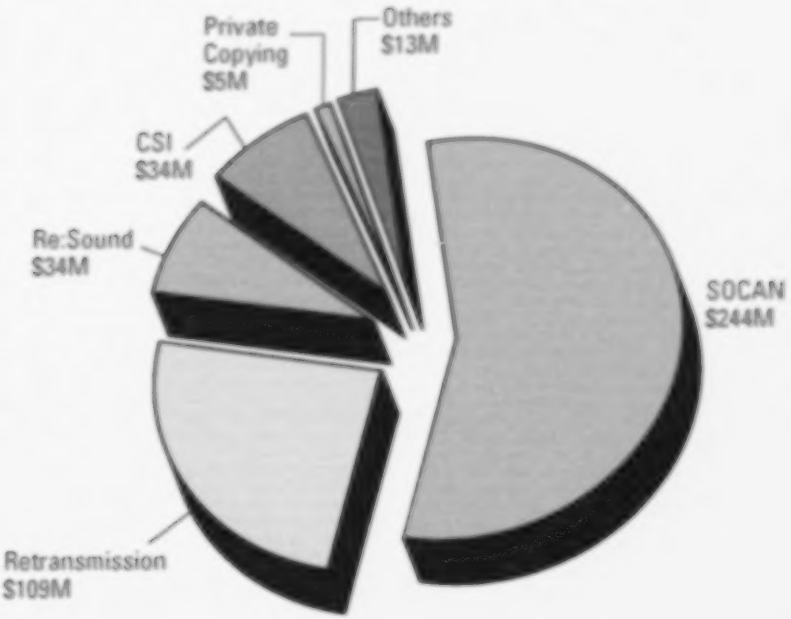
With respect to the interrogatory process, the paper's stated objectives were to minimize the burden of the process on parties, to streamline it, to reduce disputes and to prevent the process from being a bar to the participation of some stakeholders. The recommendations largely proposed to retain the status quo. Some level of non-constraining involvement on the part of the Board early on was recommended as a tool to help the parties better focus their questions, based in part on the tentative positions offered by the parties early on in the process. In the end, however, real decisions about the relevance and extent of interrogatories would be made, as they are now, when the person being asked a question objects to it.

In parallel to this exercise, there were a number of initiatives undertaken by the two Departments responsible for the copyright legislation: Innovation, Science and Economic Development Canada and Canadian Heritage. These initiatives deal with a number of issues related to the Copyright Board and its processes. In view of these, the Board decided to hold on issuing a decision with respect to the Committee's recommendations, so that it can benefit from the Departments' initiatives.

Total Royalties Generated by the Board's Tariffs

The total amount of royalties generated by the tariffs the Board certifies is estimated at $439 million for the year 2014. The following chart shows the allocation of these royalties among the various collective societies. SOCAN receives the most important share of these royalties, corresponding to more than half of the total. The nine retransmission collectives together come in second, followed by CSI and Re:Sound.

Royalties Generated by the Board's Tariffs, 2014
by Collective Societies



Copyright Board of Canada

ORGANIZATION OF THE BOARD

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

Chairman

The Honourable Robert A. Blair was appointed Chairman of the Board in May 2015 for a five-year term. The Honourable Robert A. Blair was appointed to the Court of Appeal for Ontario in November 2003, after serving for 12 years as a trial judge on the Superior Court. In both capacities, he has presided over matters involving almost all areas of the law, with a particular emphasis as a trial judge on cases on the Commercial List in Toronto and a continuing involvement with such cases at the appellate level. He received his B.A. (Hons.) from Queen's University in 1965 and his LL.B. from University of Toronto Law School in 1968. He was called to the Bar in Ontario in 1970 and received his Queen's Counsel designation in 1982.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.

Vice-Chairman & Chief Executive Officer

Claude Majeau was appointed as full-time Vice-Chairman and Chief Executive Officer in August 2009 for a five-year term and reappointed in 2014 for a three-year term. He occupied the position of Secretary General of the Copyright Board from 1993 until his appointment as Vice-Chairman. Before joining the Board, Mr. Majeau worked for the Department of Communications of Canada from 1987 to 1993 as Director (Communications and Culture) for the Quebec Region. From 1984 to 1987, he was Chief of Staff to the Deputy Minister of the same department. Before 1984, he occupied various positions dealing with communications and cultural industries and public policy. Mr. Majeau earned an LL.B. from the *Université du Québec à Montréal* in 1977 and has been a member of the Barreau du Québec since 1979.

Member

J. Nelson Landry was appointed in February 2010 as a part-time member for five years and reappointed in 2015 for a three-year term. Mr. Landry has served as a domain name arbitrator for the World Intellectual Property Organisation (WIPO) since 2001. From 2002 to 2005, he was an instructor for the Patent Agent Training Course – Infringement and Validity at the Intellectual Property Institute of Canada. In 2003, he gave a management of intellectual property course at the MBA level at the *Hautes Études Commerciales* of the *Université de Montréal* and from 1969 to 2002, Mr. Landry was a lawyer at Ogilvy Renault where he retired as senior partner in 2002. Mr. Landry obtained a BA in 1959 and a BSc in 1965 from the *Université de Montréal*. He also graduated with a B.C.L. from McGill University in 1968 and was called to the Quebec Bar in 1969.

The Board is a micro organization, consisting of 16 employees organized in five functional groups:

- Secretariat
- Research and Analysis Group
- Legal Analysis Group
- Ministerial Services
- Technical Support

*Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2015-2016 (Part III of the Estimates) and the Performance Report for 2015-2016. These documents are or will soon be available on the Board's Web site (**www.cb-cda.gc.ca**).*

COLLECTIVE ADMINISTRATION OF COPYRIGHT

In Canada, the collective administration of copyright is supported by a number of collective societies. These collective societies are organizations that administer the rights of several copyright owners. They can grant permission to use their works and set the conditions for that use. Some collective societies are affiliated with foreign societies; this allows them to represent foreign copyright owners as well.

The Board regulates Canadian collective administration organizations through one of the following regulatory regimes.

Public Performance of Music

The provisions beginning with section 67 of the *Act* deal with the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television (including cable and satellite) or the Internet. Collective societies collect royalties from users based on the tariffs certified by the Board.

Two collective societies operate under this regime:

- The Society of Composers, Authors and Music Publishers of Canada (SOCAN) administers the right to perform in public or to communicate to the public by telecommunication musical works;
- Re:Sound Music Licensing Company (Re:Sound) collects royalties for the equitable remuneration of performers and makers for the performance or communication of sound recordings of musical works.

General Regime

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes.

There are a number of collective societies operating under this regime, including the following:

- Access Copyright, The Canadian Copyright Licensing Agency (Access Copyright) represents writers, publishers and other creators for the reproduction rights of works published in books, magazines, journals and newspapers. It licenses uses in all provinces except Quebec;
- The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) represents similar rights owners as Access Copyright, but for uses in Quebec;
- Artisti is the collective society founded by the *Union des artistes* (UDA) for the remuneration of performers' rights;
- ACTRA Recording Artists' Collecting Society (ACTRA RACS), a division of ACTRA Performers' Rights Society (ACTRA PRS), collects and distributes equitable remuneration for eligible recording artists;

- CONNECT Music Licensing (formerly known as Audio-Video Licensing Agency (AVLA)) (CONNECT) administers licences in Canada for the reproduction of sound recordings, and the reproduction and broadcast of music videos on behalf of all the major record companies, many independent labels, as well as artists and producers;
- The *Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec* (SOPROQ) administers similar rights as CONNECT. Its members are mostly Francophone independent record labels;
- The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming and excerpts of programming owned by commercial radio and television stations and networks in Canada;
- The Canadian Musical Reproduction Rights Agency (CMRRA) collects royalties on behalf of Canadian and U.S. publishers for the reproduction rights of musical works in Canada;
- The Musicians' Rights Organization Canada (MROC) collects royalties on behalf of musicians and vocalists for the public performance of their recorded works;
- The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) administers royalties stemming from the reproduction of musical works. It represents members mostly from the province of Quebec; and,
- CMRRA/SODRAC Inc. (CSI), a joint venture of CMRRA and SODRAC, licenses the reproduction rights of songwriters and music publishers whose songs are active in the Canadian market place.

More details about other collective societies operating under this regime can be found on the Board's website at: http://www.cb-cda.gc.ca/societies-societes/index-e.html.

Retransmission of Distant Signals

Sections 71 to 76 of the *Act* provide for royalties to be paid by cable companies and other retransmitters for the retransmission of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

There are currently nine collective societies receiving and distributing royalties under this regime:

- The Border Broadcasters Inc. (BBI) represents the U.S. border broadcasters;
- The Canadian Broadcasters Rights Agency Inc. (CBRA) represents commercial radio and television stations and networks in Canada;
- The Canadian Retransmission Collective (CRC) represents all PBS and TVOntario programming (producers) as well as owners of motion pictures and television drama and comedy programs produced outside the United States;

- The Canadian Retransmission Right Association (CRRA) represents the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and *Télé-Québec*;
- The Copyright Collective of Canada (CCC) represents copyright owners (producers and distributors) of the U.S. independent motion picture and television production industry for all drama and comedy programming;
- The Direct Response Television Collective Inc. (DRTVC) claims royalties for all television programs and underlying works in the form of direct response television programming (defined as "infomercials");
- FWS Joint Sports Claimants Inc. (FWS) represents the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues;
- The Major League Baseball Collective of Canada Inc. (MLB) claims royalties arising out of the retransmission of major league baseball games in Canada; and,
- SOCAN, representing owners of the copyright in the music that is integrated in the programming carried in retransmitted radio and television signals.

Educational Rights

Under sections 29.6, 29.7 and 29.9 of the *Act*, educational institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff, pursuant to sections 71 to 76 of the *Act*.

There is currently however no collective society representing the interests of copyright owners for this regime.

Private Copying

The private copying regime, as set in sections 79 to 88 of the *Act*, entitles an individual to make copies (a "private copy") of sound recordings of musical works for that person's personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid.

The Canadian Private Copying Collective (CPCC) is the collective society for the private copying levy, collecting royalties for the benefit of eligible authors, performers and producers. The member collectives of the CPCC are CMRRA, Re:Sound, SODRAC and SOCAN.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, when a collective society and a user are unable to agree on the terms of the licence and on application filed by either one of them, the Board can set the royalties and the related terms and conditions of a licence for the use of the repertoire of a collective society to which section 70.1 applies.

TARIFFS PROPOSED BY COLLECTIVE SOCIETIES

In 2016, the following collective societies filed their proposed statements of royalties to be collected in 2017 and beyond:

CBRA

- Proposed tariff for the fixation and reproduction of works and communication signals by commercial media monitors, 2017-2019.
- Proposed tariff for the fixation and reproduction of works and communication signals by non-commercial media monitors, 2017-2019.

CMRRA

- Proposed tariff for the reproduction of musical works embodied in music videos by online music services, 2017 (Tariff 4).
- Proposed tariff for the reproduction of musical works by commercial television stations, 2017 (Tariff 5).
- Proposed tariff for the reproduction of musical works by the Television Services of the Canadian Broadcasting Corporation, 2017 (Tariff 6).
- Proposed tariff for the reproduction of musical works by audiovisual services, 2017 (Tariff 7).

CPCC

- Proposed levies to be collected on the sale of blank audio recording media, 2017.

CSI

- Proposed tariff for the reproduction of musical works by commercial radio stations, 2017.
- Proposed tariff for the reproduction of musical works by non-commercial radio stations, 2017.
- Proposed tariff for the reproduction of musical works by online music services, 2017.

SOCAN

- Proposed tariffs for the right to perform in public or to communicate to the public by telecommunication musical or dramatico-musical works forming part of its repertoire, 2017:
  - Tariff 1.A – Commercial Radio
  - Tariff 1.B – Non-Commercial Radio other than the Canadian Broadcasting Corporation
  - Tariff 1.C – CBC Radio
  - Tariff 2.A – Commercial Television Stations
  - Tariff 2.B – Ontario Educational Communications Authority
  - Tariff 2.C – Société de télédiffusion du Québec
  - Tariff 2.D – Canadian Broadcasting Corporation
  - Tariff 4.A.1 – Popular Music Concerts, per-event licence
  - Tariff 4.A.2 – Popular Music Concerts, annual licence
  - Tariff 6 – Motion Picture Theatres
  - Tariff 9 – Sports Events
  - Tariff 15.A – Background Music in Establishments not Covered by Tariff No. 16 – Background Music
  - Tariff 15.B – Background Music in Establishments not Covered by Tariff No. 16 – Telephone Music on Hold
  - Tariff 16 – Background Music Suppliers

- Tariff 17 – Transmission of Pay, Specialty and Other Television Services by Distribution Undertakings
- Tariff 22.A – Internet - Online Music Services
- Tariff 22.B – Internet - Commercial Radio, Satellite Radio and Pay Audio
- Tariff 22.C – Internet - Other Audio Websites
- Tariff 22.D1 – Internet - Audiovisual Content
- Tariff 22.D2 – Internet - User-Generated Content
- Tariff 22.E – Internet - Canadian Broadcasting Corporation
- Tariff 22.G – Internet - Game Sites
- Tariff 24 – Ringtones and Ringbacks
- Tariff 26 – Pay Audio Services

SODRAC

- Proposed tariff for the reproduction of musical works embedded into cinematographic works for the purpose of distribution of copies of the cinematographic works for private use or theatrical exhibition, 2017-19 (Tariff 5).
- Proposed tariff for the reproduction of musical works embedded in musical audiovisual works for their transmission by a service, 2017 (Tariff 6).
- Proposed tariff for the reproduction of musical works embedded in an audiovisual work for their transmission by a service, 2017 (Tariff 7).
- Proposed tariff for the reproduction of musical works by commercial television stations, 2017 (Tariff 8).

Re:Sound

- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works by non-commercial radio stations other than the Canadian Broadcasting Corporation, 2017-2021 (Tariff 1.B).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works by the Canadian Broadcasting Corporation, 2017-2019 (Tariff 1.C).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works by pay audio services, 2017-2018 (Tariff 2).
- Proposed tariff for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works by background music suppliers, 2017 (Tariff 3.A).
- Proposed tariff for the performance in public or the communication to the public by telecommunication of published sound recordings of musical works for background music, 2017 (Tariff 3.B).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works in respect of non-interactive and semi-interactive webcasts, 2017 (Tariff 8).

REQUESTS FOR ARBITRATION

The Board received two requests for arbitration in the year 2015-16.

On December 3, 2015, SODRAC wrote to the Board, requesting a modification to the CBC interim licence 2008-2012, part of which had been struck down by the Supreme Court's decision in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57.

On March 24, 2016, SODRAC wrote to the Board, requesting that the Board fix the CBC licence terms with respect to the reproduction of musical works for 2016-2017. It also requested that some of the relevant interim licences be continued until this licence could be determined.

In addition, as a result of the Supreme Court's decision in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, the Board has put in place a process to redetermine the permanent SODRAC-CBC 2008-2012 licence.

Copyright Board of Canada

HEARINGS

During the fiscal year, the Board held two hearings. One hearing concerned the retransmission of distant television signals in Canada, for the years 2014 to 2018. Nine collective societies as well as five broadcasting distribution undertakings were represented at the hearing, which took place in January and March 2016.

A second hearing concerned the reproduction of literary works by post-secondary educational institutions in Canada, for the years 2011 to 2017. At the hearing, Access Copyright, as well as an intervenor, Sean Maguire, were represented. The hearing took place in January 2016.

DECISIONS

During the fiscal year 2015-16, the following two decisions in respect of the indicated collective society and tariff were rendered:

Access Copyright

May 23, 2015 – Access Copyright Provincial and Territorial Governments Tariff, 2005-2014

Access Copyright (Access) filed proposed tariffs for the reproduction in Canada (excluding Quebec) of works in its repertoire by employees of provincial and territorial governments for the years 2005 to 2009 and 2010 to 2014. Various governments objected to the tariffs.

For the 2005-2009 tariff, Access proposed a rate of $10.50 per full-time equivalent employee (FTE). For the 2010-2014 tariff, it proposed $11.70 per FTE. The Objectors rather proposed FTE rates between $0.01 and $0.22 for the 2005-2009 tariff and $0.07 and $0.73 for the 2010-2014 tariff.

Crown Immunity

On January 15, 2010, the issue of whether the *Copyright Act* was binding on the Crown in right of the provinces was raised by some Objectors as a preliminary matter. The matter challenged the Board's jurisdiction to certify this tariff. This preliminary issue was heard in September, 2011 and dismissed in January, 2012. The decision of the Board was upheld by the Federal Court of Appeal in April, 2013.

The Methodology for Determining the Tariff

Access proposed to use a "market comparable" approach called "Fair Market Value" (FMV). This approach is based on agreements between Access or Copibec and governments in Canada.

The Objectors submitted that the Board should adopt the methodology it used in its 2009 decision relating to the reproduction of works in Access' repertoire by elementary and secondary schools for the years 2005 to 2009 (*2009 K-12* Decision). In that decision, the Board established the rates based on the volume of compensable copies of works, multiplied by the per-page value of each genre of copied works, divided by the number of students ("volume-times-value methodology").

In this matter, the volume of compensable copies was determined based on a volume study Access and the Objectors agreed to conduct on the nature and volume of works reproduced by government employees. The study was conducted during the year 2011.

The Board chose the volume-times-value methodology, for several reasons. First, since the FMV price is the highest acceptable price, it is neither likely to be the transactional price, nor a fair and equitable one. Second, Access applied the FMV approach inconsistently and inaccurately. Third, the volume study provided unique and substantial information about copying in governments.

Phase 1 of the volume study consisted of an online questionnaire, which asked about the respondents' copying patterns and gathered

information on the most recent copying event. Phase 2 consisted of logs of copying activities over a period of 14 consecutive days.

The Board selected Phase 2 data to set the tariff; there were 291 copying events for analysis. The Board determined which events were compensable, and scaled them up to represent all government employees for a full year. Compensability is described further in the next several sections.

Repertoire

In determining the royalty rates it sought, Access included works of rights holders who entered into an affiliation agreement with Access (the "affiliates"), as well as works of rights holders who had not entered into an affiliation agreement with Access, (the "non-affiliates") but who had accepted royalty payments from Access. In the latter case, Access argued that when non-affiliates accept such payments, this creates an implied agency relationship between Access and the non-affiliated rights holders, thus making the works of non-affiliates part of Access' repertoire. The Objectors disagreed. They contended that Access' repertoire only comprised works of rights holders with whom Access had entered into an affiliation agreement.

The Board dismissed Access' position. First, no payments had been made by Access in relation to the copies captured in the volume study. Since no payments had been made, no agency relationship could have arisen between Access and the rights holders. In addition, even if such payments had been made, Access' distribution model is not based on actual copying. As such, acceptance by rights holders of royalties not based on actual copying cannot serve as a basis for an implied agency by ratification. This conclusion resulted in the exclusion of about 13 per cent of the initial events.

Digital Copies

The 2010-2014 proposed tariff sought to permit the making of digital copies. The proposed tariff provided that the making of digital copies was restricted by the "deletion provision," which stated that where the licensee is no longer covered by a tariff, the licensee shall immediately cease to use them and delete them.

The Board excluded the deletion provision from the tariff for two reasons. First, this provision would have the effect of creating an obligation that could be triggered after the tariff's expiration. Second, there was no reason why the licensee should eventually have to delete its lawfully-made copy after termination of the tariff. Since the evidence showed that Access did not have the authorization from its affiliates to license the making of digital copies without such a deletion requirement, and since the Board would not include such a provision in the tariff, the Board concluded that digital copies were not permitted under the Tariff, and were thus not compensable. This resulted in the exclusion of 100 events, or 34 per cent of the total.

Non-substantial Copying

Access argued that in assessing substantiality, the Board had to make both a quantitative and a qualitative assessment of the excerpts copied. Since the evidence did not contain "qualitative" information, no deductions were thus to be made on account of non-substantial copying. The Objectors disagreed. In their view, copying 1 or 2 pages of a work could generally be said to be insubstantial copying. Without the benefit of a qualitative analysis for each copied work, the Board concluded that the Objectors' proposal was reasonable, as long as that the copying of 1 or 2 pages did not exceed more than 2.5 per cent of the entire work. This led to the exclusion of five additional events.

Fair Dealing

The test for fair dealing was articulated by the Supreme Court in the *CCH* decision. The first step determines whether the dealing is for an allowable purpose. Under the first step, the Board determined that it is the purpose of the government employee that is relevant. The second step assesses whether the dealing is fair. To assess whether the dealings were fair, the Board analyzed each of the remaining copying events of the volume study through the analytical framework set out by the Supreme Court and, in doing so, examined the goal of the dealing, the character of the dealing, the amount of the dealing, whether there were alternatives to the dealings, the nature of the work, and the effect of the dealing on the work. The Board considered the copying events of the volume study one-by-one. Of the 136 remaining copying events, the Board concluded that 97 events were fair; it excluded these events from compensability.

Rates

Of the total initial 291 events analyzed, 39 remained as compensable events. This translated into exposures for each of the four genres (books, magazines, newspapers and journals), the total of which was 232,602 exposures for the period 2005-2009 and 2,615,259 for the period 2010-2014. The difference between the two periods is accounted by the fact that Access did not seek to include printing from an electronic file in its proposed tariff for the period 2005-2009, but did so for 2010-2014.

The next step in the volume-times-value methodology was to determine the per-page value of each genre of copied works. For books, the Board used list prices and applied an inflation adjustment as well as a 30 per cent selection premium. The Board used the creative contribution figures from its *2009 K-12* Decision. For magazines and newspapers the Board found that the all-items Consumer Price Index should be used to adjust the prices, rather than the specific subindex. Also, the Board used Access' suggestion of 30 cents per page for journal copies.

For each genre, the Board multiplied the volume of compensable exposures by the per-exposure value. The values for each genre were then added to obtain the total value of compensable exposures. Finally, this value was divided by the number of FTE.

This yielded the following annual royalties, calculated by multiplying the royalty rate of,

(i) for the years 2005 to 2009: 11.56¢
(ii) for the years 2010 to 2014: 49.71¢

by the number of annual FTEs.

The Board estimated the total annual royalties as $14,000 for the years 2005-2009, and $60,000 for the years 2010-2014.

Access filed an application for judicial review before the Federal Court of Appeal of the Board's decision.

February 20, 2016 – Access Copyright Elementary and Secondary School Tariff, 2010-2015

Access Copyright (Access) filed proposed Tariffs for the reproduction in Canada of works in its repertoire by elementary and secondary schools (excluding Quebec) for the years 2010 to 2012 and 2013 to 2015. The ministries of education of twelve Canadian provinces and territories (all, excluding Quebec) and each of the Ontario school boards (jointly, the "Objectors") filed objections to the Tariffs.

Access proposed rates of $13.69 per full-time equivalent student (FTE) for the 2010-2012 period and $9.50 per FTE for 2013-2015, while the Objectors were proposing $0.49 and $0.46, respectively.

Parties agreed to use the evidence generated by the 2005-2006 volume study the Board used in the *2009 K-12* Decision. The study, jointly done by Access and the Objectors, intended to measure the volume and nature of photocopying that occurred in elementary and secondary educational institutions, school boards, and ministries of education throughout Canada, save Quebec.

Access submitted that since the evidence was the same, Objectors should be precluded, by virtue of issue estoppel, from relitigating the Board's previous substantive findings of fact and law, namely the issues of Access' repertoire and that of the total number of photocopied pages of published works. The Board however exercised its discretion not to apply issue estoppel.

Repertoire

Access argued that its repertoire comprises works of rights holders with whom Access had entered into an affiliation agreement (the "affiliates"), as well as works of rights holders who had not entered into an affiliation agreement with Access (the "non-affiliates"), but who had accepted royalty payments from Access. Access contended that when non-affiliates accept such payments, this creates an implied agency relationship between Access and those non-affiliated rights holders, thus making the works of non-affiliates part of Access' repertoire. The Objectors disagreed. They contended that Access' repertoire only comprises works of rights holders with whom Access entered into an affiliation agreement.

In the *2009 K-12* Decision, the Board accepted Access' claim. In this instance, it did not. First, Access' witnesses explained that while Access may communicate directly with non-affiliated publishers, payments to non-affiliated creators were provided to publishers, to be redistributed to the creators. However, if the publisher is not the owner of copyright in the copied work, it has no power to ratify the copying act. Therefore, the Board decided that no agency relationship could arise when royalty payments were made to persons that are not the owners of copyright.

Second, the evidence showed that the vast majority of payments to non-affiliates were not based on actual copying. Rather, payments were based on a small sample of copying and, above all, on general distribution guidelines.

In other words, in most cases, Access is not aware of which non-affiliated works are copied. Therefore, royalties not based on actual copying cannot serve as a basis for an implied agency by ratification.

While Access proposed to license the copying of reproducibles, and the making of digital copies, the Board also did not do so in this matter because there was insufficient evidence of the amount of copying of reproducibles and the making of digital copies. The Board however agreed with Access that consumables, which essentially are workbooks to be filled in by student, intended for one-time use, should be included in the Tariff.

Of the more than 95,000 copying events measured in the volume study, 565 copying events were of sheet music. The Objectors' fundamental objection to the inclusion of sheet music was that Access' sheet music repertoire is so small that it is valueless. The Board agreed with the Objectors and therefore did not include sheet music in the Tariff.

Non-substantial Copying

With respect to non-substantial copying, Access argued that assessing whether a substantial part of a work had been copied required a quantitative and qualitative analysis of the excerpts copied. It contented that there was no insubstantial copying since all copies were qualitatively important to the teachers who copied them. The Objectors disagreed. In their view, copying 1 or 2 pages of a work could generally be considered as insubstantial. Without the benefit of qualitative evidence for each copied works, the Board concluded that the Objectors' proposal was reasonable, as long as the copying of 1 or 2 pages did not exceed 2.5 per cent of the entire work.

Fair Dealing

The test for fair dealing was articulated by the Supreme Court in the *CCH* decision. The first step determines whether the dealing is for an allowable purpose under the *Copyright Act*. The second step assesses whether the dealing is fair. To assess whether the dealings were fair, the Board analyzed the copying, using the approach described below, through the analytical framework set out by the Supreme Court and, in doing so, examined the goal of the dealing, the character of the dealing, the amount of the dealing, whether there were alternatives to the dealings, the nature of the work, and the effect of the dealing on the work.

As a result of the 2012 decision of the Supreme Court in *Alberta v. Canadian Copyright Licensing Agency*, copies made for student instruction, assignments or class work, that were deemed not to meet the first part of the *CCH* test and were thus not the subject of a fair-dealing analysis in the *2009 K-12* Decision, were now considered to meet the first part of the test and therefore were the subject of a fair-dealing analysis under the second part of the test. This resulted in the Board's finding that a significant proportion of copying by elementary and secondary schools was fair and thus did not attract remuneration.

Calculating the Tariff

The parties agreed to estimate the volume of photocopying using the volume study. The Board however first needed to determine which of the copies identified as part of the study and that were part of Access' repertoire were compensable. That entailed removing from the volume of photocopying a proportion which amounts to fair dealing.

However, unlike the *Government Tariff* where the Board had evidence on the characteristics of every measured copying event in the volume study, no such evidence was available in the present matter. Thus, rather than proceeding with a work-by-work analysis, the Board decided to rely on a statistical approach which essentially consisted in determining for each of the six fair-dealing factors the percentage of exposures that tended towards fairness, unfairness or neither direction. These percentages were then applied to the number of copies that were made for a permitted purpose, to approximate the number of copies that are made for a permitted purpose and that are also fair.

After having deducted the percentage of copies that were either non-substantial or fair, the Board found that there were a total of about 165 million compensable exposures for the period 2010-2012 and about 154 million for 2013-2015. The vast majority of these exposures (above 85 per cent) consisted of consumables. The remainder exposures were mostly of books (11 per cent), with exposures of newspapers and periodicals consisting of a small proportion of the total.

Once the number of compensable exposures was established, the Board needed to determine the price (or royalty) per exposure that should be paid to Access. This was done by starting with the prices used in the *2009 K-12* Decision, adjusting them with sector-specific inflation indexes. The Board also used the same volume discount and creative contribution, and used the values from books for consumables.

Multiplying the number of compensable exposures by the price per exposures provided the total amount of royalties that Access should receive. The final remaining step was then to divide the total royalties by the number of FTEs to obtain a rate per FTE. The Board used the number that were enrolled in 2005-2006 when the volume study was done, or 3,859,715 FTEs.

This yielded the following annual royalties, calculated by multiplying the royalty rate of,

(i) for the years 2010 to 2012: $2.46
(ii) for the years 2013 to 2015: $2.41

by the number of FTEs of each year.

The Board estimated the total annual royalties as $9.5 million for the years 2010-2012, and $9.3 million for the years 2013-2015.

Access filed an application for judicial review before the Federal Court of Appeal of the Board's decision.

UNLOCATABLE COPYRIGHT OWNERS

Pursuant to section 77 of the *Act*, the Board may grant licences authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires the applicants to make reasonable efforts to find the copyright owner. Licences granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year 2015-16, 34 applications were filed with the Board and the following 6 licences were issued:

- *Ambassadors for Christ Ministries Inc.*, White City, Saskatchewan, for the mechanical reproduction of four musical works.
- *Basic Human Needs Productions*, Regina, Saskatchewan, for the reproduction, synchronization, public performance and communication to the public by telecommunication of a sound recording.
- *Department of Canadian Heritage*, Gatineau, Quebec, for the reproduction and the public performance of two photographs.
- *Passion Pictures*, London, United Kingdom for the reproduction, the public performance and the communication to the public by telecommunication of an excerpt of a film.
- *TO Rooftop Films Inc.*, Toronto, Ontario, for the incorporation, reproduction, public performance and communication to the public by telecommunication of two articles.
- *Ville de Sorel-Tracy*, Sorel-Tracy, Quebec, for the reproduction, the public performance and the communication to the public by telecommunication of a photograph.

Federal Court of Appeal

Two applications for judicial review were filed with the Federal Court of Appeal in 2015-16:

- *The Canadian Copyright Licensing Agency v. HMQ of Alberta et al.* (File: A-293-15) on June 26, 2015, in respect of the Access Provincial and Territorial Governments Tariff, 2005-2014 (Decision of the Board, May 22, 2015).
- *Canadian Copyright Licensing Agency v. British Columbia Min. of Educ. et al.* (File: A-93-16) on March 21, 2016, in respect of the Access Elementary and Secondary Schools Tariff, 2010-2015 (Decision of the Board, February 20, 2016).

Two decisions rendered by the Federal Court of Appeal in 2015-16 were in respect of Board's decisions or tariffs:

December 18, 2015 – *Netflix Inc. v. SOCAN*, 2015 FCA 289, in respect of SOCAN Tariff 22.D.1 (Online Audiovisual Services, 2007-2013)

On July 18, 2014, the Board certified Tariff 22.D.1 pertaining to audiovisual webcasts for the period 2007 to 2013. Netflix filed an application for judicial review of this decision before the Federal Court of Appeal. More particularly, Netflix challenged paragraph 3(*b*) of the Tariff which establishes a minimal fee for free trials.

From 2007 to 2013, SOCAN filed proposed tariffs pertaining to the online broadcast of audiovisual works. The proposed tariffs, published in the *Canada Gazette*, did not contain any provision dealing with free trials. At no time did Netflix object to these proposed tariffs.

In 2012, SOCAN and the objectors asked the Board to certify the tariff based on an agreement they had entered into. While the versions of the proposed tariffs as published in the *Canada Gazette* did not provide for royalties in respect of free trials, the agreement did. Of note is the fact that none of the objectors offered free trial subscriptions; none were thus concerned with such royalties.

The Board asked the parties to make written submissions on the settlement tariff. Netflix, although not party to the proceedings, provided submissions on the issue of royalties for free trials.

The Board refused to make Netflix's submissions part of the record. First, since Netflix's submissions were not based on the record as it stood, additional evidence would be required in order to address the points raised by Netflix. Second, the issues raised by Netflix had not been raised by any of the parties to the proceedings. In making this determination, the Board pointed out that although Netflix had been aware of the proceedings for some time, it had deliberately chosen not to participate.

Nevertheless, because Netflix was a dominant player in the market, the Board permitted Netflix to participate in a new process. This new process was however to be limited to issues already raised by the parties; as such, the introduction of new evidence would not be allowed.

In that context, Netflix sought leave to introduce new limited and targeted information on the issue of free trials. SOCAN opposed Netflix's request. It argued that Netflix had to be precluded from making submissions in respect of the

settlement tariff since it had chosen not to participate in the proceedings.

On July 2, 2013, the Board dismissed Netflix's application to introduce new evidence. On July 18, 2014, the Board rendered its decision. The tariff certified by the Board provides royalties on free trials. Netflix filed an application for judicial review of the Board's decision.

The issue was described by the Federal Court of Appeal as follows: did Netflix have the right to be heard with respect to the royalties for free trials notwithstanding the fact that it did not participate in the initial opposition process? The Court, applying the standard of correctness, concluded that the process pursuant to which the Board had certified the tariff was procedurally unfair.

Netflix only took issue with the provision of the tariff pertaining to royalties for free trials. That provision did not exist in the proposed tariffs published in the *Canada Gazette*. In the Court's view, the right to object cannot be denied whenever the Board certifies a tariff which contains a subject matter that did not appear in the published tariff proposals. This is all the more so since none of the objectors offered free trials and could thus have been adversely affected by this addition in the tariff. Procedural fairness requires that a representative member of the affected segment of the industry be given the opportunity to make its point of view known and dealt with by the Board.

The Court concluded that Netflix's right to be heard was denied since Netflix had not been given an opportunity to make its case, including the possibility to file new evidence. The Court therefore set aside the decision of the Board insofar as it pertains to royalties on free trials and returned the matter to a differently constituted panel for redetermination in accordance with these reasons.

January 28, 2016 – *Rogers Communications Partnership v. SOCAN*, 2016 FCA, in respect of SOCAN Tariff 24 (Ringtones) for the years 2003-2005 and SOCAN Tariff 24 (Ringtones and Ringbacks) for the years 2006-2013

Following the Supreme Court's decision in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [*ESA*] Rogers, Telus, Bell, and Quebecor (the "Plaintiffs") brought an application, pursuant to s. 66.52 of the *Copyright Act*, to vary the Board's decision certifying tariffs that set royalties for the downloading of ringtones from the Plaintiffs onto mobile devices of their customers. The Plaintiffs argued that the tariffs were without legal foundation.

The Board denied the application, holding that it was effectively a request to rescind the tariff, and that its power did not include that power. It also concluded that a determination of the Plaintiffs' claim that SOCAN Tariff 24 (Ringtones and Ringbacks) was no longer enforceable in light of *ESA* was beyond its jurisdiction and was a question for the courts to determine.

Federal Court

Judicial review of the Board's determination was not sought. Instead, the Plaintiffs commenced an action in the Federal Court against the Society of Composers, Authors and Music Publishers of Canada (SOCAN) seeking, among other things, a declaration that the transmission of a copy of a ringtone containing a portion of a musical work is not a communication to the public by telecommunication of the musical work, and restitution of the moneys paid pursuant to the tariff to SOCAN.

On a Rule 220(1)(a) motion by the Plaintiffs (preliminary determination of a question of law), Justice James O'Reilly (the "Judge") held that the Internet transmission of a ringtone file does not constitute the communication of a musical work to the public, that an agreement between the Plaintiffs and SOCAN does not prevent them from claiming relief, and that the Plaintiffs' claim has not been finally decided against them (which could result in the claim being barred by the operation of *res judicata*).

However, the Judge also held that the Board had jurisdiction to certify the ringtone tariff, that SOCAN has not been unjustly enriched by its receipt of the tariff royalties, and that the Plaintiffs are not entitled to an order tracing the distribution of the royalties by SOCAN to its members.

Federal Court of Appeal

The conclusion that the Internet transmission of a ringtone file does not constitute the communication of a musical work to the public was not appealed by SOCAN.

The FCA agreed with the Judge that the Board had jurisdiction to certify the ringtone tariff. However, it disagreed with respect to the finding that there was no finality in the decision against the Plaintiffs. The ringtone tariff was judicially reviewed by the FCA (*Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6), which affirmed the Board's decision, and leave to appeal the Court's decision to the Supreme Court of Canada was denied. As such, the finality criterion of issue estoppel has been satisfied and the Judge erred in law in finding otherwise. Given this conclusion, whether issue estoppel bars the present claim should be decided by the trial judge.

Lastly, the FCA held that the questions of whether an agreement between the Plaintiffs and SOCAN can preclude them from the relief they seek, whether SOCAN was unjustly enriched, and whether the Plaintiffs are entitled to an order tracing the distribution of Tariff 24 royalties are not pure questions of law, and should not have been. These issues should be also be determined by the trial judge.

Supreme Court of Canada

The Supreme Court of Canada rendered one decision in respect of a decision of the Board:

November 26, 2015 – *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, in respect of SODRAC v. CBC licence 2008-2012 and interim licence 2012-2016

The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc. is a collective society organized to manage the reproduction rights of its members, primarily French-language music reproduction rights. The Canadian Broadcasting Corporation (CBC) is both a producer and a broadcaster of television programs.

When CBC produces television programs, it incorporates musical works into those programs, a process known as "synchronization." In the past, SODRAC provided CBC with licences for synchronization copies, as well as copies made by CBC for other purposes, including for broadcasting. In November 2008, after SODRAC and CBC were unable to come to an agreement for the renewal of CBC's licence, SODRAC asked the Copyright Board, pursuant to section 70.2 of the *Copyright Act*, to set the terms of the licence.

The Board set a licence for 2008-2012, holding that CBC's broadcastincidental copying activity engaged the reproduction right, that a licence for such copies could not be implied from synchronization licences covering the production process, and that CBC required a separate reproduction licence to legitimize its broadcastincidental copying. The Board valued this licence based on a ratio used in the commercial radio context and found to be equally applicable to the television context. The Board later issued an interim licence to take effect after the expiry of the 20082012 licence that extended the terms of that licence on an interim basis, subject to minor modifications. The Federal Court of Appeal upheld both the 20082012 licence and the interim licence that followed, subject to minor modifications.

Standard of Review

The Supreme Court held that because the Board and a court may each have to consider at first instance the issue of whether broadcastincidental copies engage the reproduction right the standard of correctness applies to it. A standard of reasonableness applies to all remaining issues.

Synchronization Copies

The Supreme Court affirmed the Copyright Board's finding that the making of broadcast-incidental copies engages the reproduction right, consistent with *Bishop v. Stevens*, [1990] 2 S.C.R. 467. It also agreed that a licence to make broadcast-incidental copies should not be implied from synchronization licences issued by SODRAC.

Technological Neutrality

However, the Board erred in failing to consider the principles of technological neutrality and balance in setting the valuation of this licence. The principle of technological neutrality recognizes that, absent parliamentary intent to the contrary, the *Act* should not be interpreted or applied to favour or discriminate against any particular form of technology.

In the regulatory context, the principle of technological neutrality applies to valuation of a reproduction licence, so the Board should compare the value derived from the use of reproduction in the old and new technologies in its valuation analysis.

To maintain a balance between user and rightholder interests, the Board must also assess the respective contributions of the user and the copyrightprotected works to the value enjoyed by the user. It must have regard for factors it considers relevant in striking a balance between user and rightholder rights when fixing licence fees. Relevant factors will include the risks taken by the user, the extent of the investment made by the user in the new technology, and the nature of the copyright-protected work's use in the new technology.

Interim Licence

It was reasonable to use the interim licence to maintain the *status quo* and to use the 2008-2012 statutory licence as the *status quo* in this case. However, because the interim licence was based on the terms of the 2008-2012 licence, it was set aside and the Board's decision in that regard was also remitted for reconsideration consistent with the principles guiding the redetermination of the 2008-2012 licence.

Binding Nature of Licence Set Under s. 70.2

CBC raised the issue of whether the Board's power to set the terms of a licence include the power to bind the parties to those terms. The Court held that this power does not contain within it the power to force these terms on a user who, having reviewed the terms, decided that engaging in licensed copying is not the way to proceed. Should the user then engage in unauthorized copying regardless, it will remain liable for infringement. But it will not be liable as a licensee unless it affirmatively assumes the benefits and burdens of the licence.

Conclusion

The Supreme Court set aside the 2008-2012 statutory licence as it relates to the valuation of CBC's television and Internet broadcast-incidental copies and remitted it to the Board for reconsideration of that valuation in accordance with the principles of technological neutrality and balance.

To the extent that the interim licence fees were based on the valuation of the broadcast-incidental copies in the 2008-2012 statutory licence, the Court set aside the interim licence and remitted the Interim Licence Decision for reconsideration consistent with the principles guiding the redetermination of the 2008-2012 licence.

AGREEMENTS FILED WITH THE BOARD

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licences for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties and the related terms and conditions of the licence.

In 2015-16, 389 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright filed 152 agreements granting educational institutions, language schools, non-profit associations, copy shops and other users a licence to photocopy works in its repertoire.

Copibec filed 233 agreements concluded, in particular, with various educational institutions, municipalities, non-profit associations and other users.

CMRRA filed 4 agreements.